

STATE OF MICHIGAN
COURT OF APPEALS

SHARON LENTON HALL, Personal
Representative of the Estate of James Lenton, and
PHOEBE LENTON,

UNPUBLISHED
June 19, 2003

Plaintiffs-Appellants,

v

SHANE BIDDINGER and CITY OF
NORTHVILLE,

No. 238621
Wayne Circuit Court
LC No. 00-014145-NF

Defendants-Appellees.

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant City of Northville's motion for summary disposition and the dismissal with prejudice of defendant Shane Biddinger following acceptance of a case evaluation. We affirm.

Plaintiffs contend that the trial court erred in granting defendant city's motion for summary disposition based on the doctrine of governmental immunity. Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by governmental immunity. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A municipality is generally immune from tort liability while engaged in a governmental function. MCL 691.1407(1); *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002).

Plaintiffs contend that defendant city was not engaged in a governmental function because it was required to provide adequate traffic protection under MCL 431.321. In other words, plaintiffs contend that defendant city was not authorized by law to provide *no* protection. A governmental function is any activity "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998), quoting MCL 691.1401(f).

Here, defendant city's activity was authorized by both MCL 431.321 and its general police powers. When a city performs an authorized duty improperly, it is still engaged in a governmental function. *Richardson v Jackson Co*, 432 Mich 377, 385-387; 443 NW2d 105 (1989); *Palmer v Western Michigan Univ*, 224 Mich App 139, 142; 568 NW2d 359 (1997). Indeed, an activity is ultra vires only when the government lacks any legal authority.

Richardson, supra at 387. Thus, although plaintiffs can make a credible argument that defendant city failed to properly perform its duty to provide adequate protection, we nevertheless conclude that defendant city was engaged in a governmental function.

Plaintiffs also contend that the activity was a proprietary function. Governmental immunity does not apply to proprietary functions, which are defined as activities conducted primarily to produce a profit for the government agency *and* not normally supported by taxes or fees. MCL 691.1413; *Russell v Dept' of Corrections*, 234 Mich App 135, 138; 592 NW2d 125 (1999). Although defendant arguably provided police presence at the racetracks primarily for the promised revenue share, traffic protection outside any establishment is normally supported by taxes or fees. Therefore, defendant was not engaged in a proprietary function. MCL 691.1413.

Finally, plaintiffs suggest the statute requiring cities to provide adequate protection, MCL 431.321, created a separate exception to governmental immunity. Although MCL 431.321 did not expressly create an exception to governmental immunity, a statute may imply an exception to governmental immunity by creating a necessary inference that an immunity exception was intended. *Ballard v Ypsilanti Twp*, 457 Mich 564, 574-576; 577 NW2d 890 (1998). MCL 431.321 does impose a specific duty on government entities. However, the statute's language, the legislative history, and the circumstances surrounding its adoption do not indicate that the Legislature intended to create a private cause of action against anyone. If anything, the statute suggests that the proper remedy for a violation of MCL 431.321 is the withholding of racetrack proceeds. Therefore, we are not persuaded that MCL 431.321 created an implied exception to governmental immunity. Consequently, the trial court did not err in concluding that plaintiffs' lawsuit was barred by governmental immunity.¹

Plaintiffs also challenge the dismissal of defendant Biddinger following mutual acceptance of a case evaluation, arguing that the case evaluation process under MCR 2.403 violated their constitutional rights to due process and a jury trial. Plaintiffs objected to the case evaluation on these grounds, and the trial court rejected the argument. In *Haberkorn v Chrysler Corp*, 210 Mich App 354, 381; 533 NW2d 373 (1995), we ruled that the case evaluation process does not violate either due process or equal protection concerns because it is rationally related to the legitimate governmental purpose of expediting litigation. In *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 133; 573 NW2d 61 (1997), we ruled that the case evaluation process does not violate the right to a jury trial because it does not prevent a party from rejecting the evaluation and proceeding to trial. Consequently, plaintiffs' challenges to the constitutionality of the case evaluation process are without merit.

¹ Plaintiffs also contend that the "special relationship" rule should be extended to government agencies. This rule relates to a party's duty, and does not provide an exception to governmental immunity, *Smith v Jones*, 246 Mich App 270, 275-276; 632 NW2d 509 (2001). Regardless, there is absolutely no evidence of the necessary elements of "direct contact" and "justifiable reliance." *Id.*, quoting *White v Beasley*, 453 Mich 308, 320-321; 552 NW2d 1 (1996).

Affirmed.

/s/ Donald S. Owens

/s/ Richard A. Bandstra

/s/ Christopher M. Murray